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NO. 2898.

---IN THE---

UNITED STATES CIRCUIT COURT *of* APPEALS

FOR THE NINTH CIRCUIT

SANBORN-CUTTING COMPANY, a corporation,
Appellant,

---VS.---

V. A. PAINE, as Trustee of the Kake Trading and Packing Company, a corporation, Bankrupt,
Appellee.

Brief for Appellee

On Appeal from the District Court of the United States for the District of Oregon.

HON. R. S. BEAN, District Judge

GUNNISON & ROBERTSON, Juneau, Alaska,
JAMES J. CROSSLEY, Portland, Oregon,
ATTORNEYS FOR APPELLEE.

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STATEMENT OF FACTS.

Inasmuch as, in our opinion, appellant's statement of facts is manifestly erroneous, we strenuously controvert it and, hence, shall briefly set forth the facts of the case. However, before discussing the facts disclosed by the evidence, we shall summarize the pleadings.

Appellee (plaintiff below) on December 6, 1915, instituted two suits: one in the United States District Court for Oregon, at Portland, Oregon, and one in the District Court for Alaska, at Juneau, Alaska, in both of which the Sanborn-Cutting Company (appellant) and the Kake Packing Company (hereinafter designated as Packing Company) were defendants. In the suit instituted in Oregon, F. P. Kendall, George W. Sanborn

and S. S. Gordon were also made defendants. For convenience, these suits are hereinafter respectively designated as the Oregon suit and the Alaska suit.

PLEADINGS.

OREGON SUIT

Complaint.

Alleges the bankruptcy and citizenship of the Kake Trading and Packing Company (hereinafter designated as Trading Company) (P. R. 4); the qualification of appellee as trustee, and that assets in hand are insufficient to pay the claims of the bankrupt's creditors (P. R. 5); the citizenships of the various defendants (P. R. 5): the management of the Trading Company by Kirberger, and the latter's illusions as to prospects of fishing industry (P. R. 5, 6); the formation and organization of the Packing Company (P. R. 6, 7, 8); the knowledge of the individual defendants of the corporate character of the Trading Company (P. R. p. 8); the ownership of property in or near Kake, Alaska, by the Trading Company, which property was valuable for use in the fishing industry (P. R. 8); the agreement, and its fulfillment, of Trading Company to convey said property to Packing Company for 85 shares stock in latter company (P. R. 8, 9); the payment of $8500.00 to Trading Company for said property, and repayment of said sum to Packing Company for said shares of stock (P. R. 9); the delivery of said stock in Kirberger's name but that he took it as trustee for Trading Company, with whose assets the stock was purchased, and that said stock became property of appellee upon his appointment as trustee (P. R. 9); indebtedness of Packing Company to

Trading Company for $4,000.00, and its payment to Trading Company, and the unauthorized use thereof by Kirberger in purchasing 40 additional shares of stock in Packing Company (P. R. 10); the knowledge of individual defendants of Kirberger's unauthorized use of said $4,000.00 which was property of Trading Company (P. R. 10); the taking of said 40 shares in name of Kirberger, but that he held them in trust for Trading Company, and that appellee became owner thereof upon appointment as trustee (P. R. 11); allegation as to amount of stock subscribed and paid for of Packing Company (P. R. 11); assignment on or about January 14, 1914, of said 125 shares of stock in Packing Company (being the 85 shares plus the additional 40 shares) to Kendall and Sanborn by Kirberger, in fraud of the Trading Company, and with intent to hinder, delay and defraud the latter's creditors (P. R. 11); the knowledge of Sanborn and Kendall (P. R. 12); the insolvency at that time of the Trading Company, and the knowledge of Kendall, Sanborn and Kirberger thereof (P. R. 12, 13); the unlawful conveyance of all the assets of the Packing Company to the appellant on or about May 11, 1914, the domination of the Packing Company by appellant at that time (P. R. 13, 14, 15); the holding by Sanborn and Kendall of said 125 shares of stock (P. R. 15); the discontinuance of the business of the Packing Company by reason of the sale of its entire assets, and the use of the latter by appellant (P. R. 15); the earning of profits by appellant from use of said assets, and failure to account therefor (P. R. 16, 17); that the terms and forfeitures of the assignment of January 6,

1914, are unjust, harsh and inequitable, its consideration grossly inadequate; and that it was not mutual but solely for benefit of Sanborn and Kendall, and made by Kirberger without authority (P. R. 17); the making by Packing Company of conveyance to appellant in violation of rights of minority stockholders and in violation of duties of its board of directors (P. R. 19); the domination of Packing Company by Kendall, Gordon and Sanborn and that the Packing Company will not take steps to avoid and set aside said conveyance (P. R. 20).

Answer.

Appellant answered generally and with three affirmative defenses; admitting the conveyance to it of the Packing Company's entire assets (P. R., p. 27), however, claiming the conveyance was bona fide for an agreed consideration of $72,621.01, but that it actually paid $81,177.18 in gold coin (P. R. 28). It also alleged that appellee ought to be estopped from contending the conveyance was fraudulent and void, because it had paid said sum for said assets (P. R. 29, 30). It further alleged that on May 12, 1914, the Packing Company offered to sell its entire assets to appellant for $72,621.01, being its represented entire liabilities, exclusive of a claim of $8,582.21 then owned by Kendall and Sanborn, being a claim for goods, wares and merchandise which the Trading Company had sold and delivered to the Packing Company (P. R. p. 31), which claim had theretofore been assigned to Kendall and Sanborn, and Kendall and Sanborn agreed to cancel and discharge said indebtedness if appellant would accept such offer of the Packing Company (P. R. p. 31) that appellant accepted said

offer and on May 12, 1914, the Packing Company, upon authorization of its stockholders and board of directors, conveyed its entire assets to appellant (P. R. p. 32); that the Packing Company at said time delivered a statement of its liabilities amounting to $72,621.01, which was incorrect as it should have been $81,177.18, which last named sum appellant paid (P. R. 32, 33). In its third affirmative defense, appellant set up appellee's complaint in the ALASKA suit (P. R. pp. 35 to 52); that appellant had been duly served with summons in that suit and had entered its appearance; that the appellee should be restrained from prosecuting the ALASKA suit (P. R. pp. 53, 54).

Reply.

Appellee replied, denying that appellant was a bona fide purchaser for a valuable consideration or that the conveyance of the Packing Company's assets was made in good faith (P. R. p. 57), and alleged that appellant had knowledge of the affairs of the Packing Company (P. R. 58). In reply to the first and second affirmative defenses, appellee alleged that the 125 shares of stock in the Packing Company, purchased with assets of and owned by the Trading Company, had been conveyed to Kendall and Sanborn, with knowledge, to defraud the Trading Company and to hinder, delay and defraud the latter's creditors (P. R. pp. 58, 59, 69, 70); that the Trading Company was then insolvent, that all the parties had knowledge thereof, that Kirberger had no authority to make said assignment, that Kendall and Sanborn had knowledge of such want of authority, that the latter are not bona fide purchasers of said stock for a

valuable consideration, and that the Trading Company never authorized or ratified said assignment (P. R. pp. 58, 59, 60, 61, 62, 63, 70, 71, 72); that said assignment is null and void (P. R. 61, 63, 71, 72); that in pursuance to the plan under which said stock assignment was made, the Trading Company on January 6, 1914, through Kirberger, assigned to Kendall and Sanborn a debt of $8,582.21 which the Packing Company then owed the Trading Company, with intent to hinder, delay and defraud the latter's creditors and to defraud the Trading Company thereof (P. R. pp. 62, 63, 72, 73). (At this point, attention is called to the fact that it is apparent that the printed record is typographically incorrect in that the printed matter on page 62 and at top of page 63 should follow the printed matter commencing with the paragraph on page 63. This is clearly shown by a comparison with pages 72 and 73 of the printed record.) Kirberger's want of authority to make said assignment, and that the Trading Company has never authorized or ratified the same (P. R. p. 62); the insolvency of the Trading Company at that time, and the knowledge of the parties of said insolvency (P. R. pp. 62, 73); that said assignment is null and void (P. R. 63, 74); the conveyance of the Packing Company's entire assets to appellant (P. R. pp. 64, 75); the domination of the Packing Company by appellant (P. R. pp. 64, 65, 66, 76, 77, 78); that said conveyance was made in violation of the rights of the Packing Company's minority stockholders and with intent to hinder, delay and defraud its creditors, particularly its creditor, the Trading Company (P. R. p. 65, 66, 67, 76, 77, 78); that said

conveyance is null and void (P. R. p. 67, 74, 75, 78); that appellant took said assets with knowledge of the unpaid debts of the Packing Company (P. R. p. 66, 76, 77); that appellee obtained judgment in the District Court for Alaska against the Packing Company on August 27, 1915, for $10,333.31, together with interest and costs, aggregating $10,833.31; that execution on said judgment has been returned nulla bona; and that appellee, in addition to the relief prayed for in the complaint, is entitled to recover that further sum from appellant (P. R. 67, 68, 81, 82). In his reply (P. R. p. 83) to appellant's third affirmative defense, appellee set up in haec verba the judgment (Pl. Ex. 70) obtained by him against the Packing Company (P. R. p. 95); the return of execution (Plff. Ex. 71) in that suit nulla bona and wholly unsatisfied (P. R. p. 96); that the stock assignment and the debt assignment were each invalid, null and void; that the conveyance of the assets was invalid, null and void; the knowledge of the appellant; the domination of the Packing Company by appellant. Appellee renewed the prayer of his complaint and also asked for decree for the further sum of $10,833.13, being the $10,333.13 plus costs and interest from January 31, 1915, and that Kendall and Sanborn be restrained from disposing of both the 125 shares of stock and the claim against the Packing Company (P. R. p. 100).

ALASKA SUIT.

Complaint.

The complaint, in brief, alleged the adjudication in bankruptcy of the Trading Company (P. R. p. 107); the appointment of the appellee as trustee in

bankruptcy (P. R. p. 107); the citizenship of the Packingk Company (P. R. p. 108); its failure to properly domesticate in Alaska and pay the annual territorial license fees (P. R. p. 108); the citizenship of the appellant (P. R. p. 108); its failure to properly domesticate in Alaska and pay the annual territorial license fees (P. R. p. 108); its doing of business in Alaska and within the jurisdiction of the Alaskan court since May 12, 1914 (P. R. p. 108); the devolution upon appellee as trustee of the property and assets of the Trading Company, including a debt against the Packing Company (P. R. p. 109), for which on August 27, 1915, in the District Court for Alaska, at Juneau, appellee obtained judgment against the Packing Company in the sum of $10,333.31, with interest from January 31, 1915 (P. R. pp. 109, 119); that an execution issued August 31, 1915, on said judgment to the United States Marshal for the division of Alaska in which the Packing Company property was located, had been returned wholly unsatisfied and nulla bona (P. R. p. 110); that on May 12, 1914, the Packing Company with intent to hinder, delay and defraud its creditors, particularly its creditor, the Trading Company, conveyed all its assets to the appellant (P. R. p. 111); that at the time of the transfer the Trading Company was a creditor of the Packing Company (P. R. p. 112); that the appellant was not a bona fide purchaser of said assets (P. R. p. 112); but on the contrary had full notice, and assisted and aided the Packing Company (P. R. p. 112); that the directors of the Packing Company and of appellant schemed and conspired together

to defraud the Trading Company out of, and from obtaining payment of, its debt against the latter; that at the time of the making of said conveyance the majority of the stock of the Packing Company was controlled and dominated by owners of the majority of the stock of the appellant, and the board of directors of the Packing Company was dominated and controlled by the board of directors of the appellant (P. R. 112); that two of the directors of appellants were owners of the majority of the stock of the Packing Company, and dictated, dominated, controlled and held the majority of the stock of the latter corporation; that one of the directors of the appellant was a director of the Packing Company; that the appellant caused the Packing Company to convey to the former all the latter's assets with the intent to hinder, delay and defraud all the Packing Company's creditors, including the Trading Company, except those debts which said directors and their relatives of the Packing Company held, and that the Packing Company conveyed to the appellant with said intent; that appellant received said assets with knowledge and notice that the Packing Company owed just and lawful debts which had not been paid, and that its creditors would be delayed, hindered and defrauded; that said property is equitably subject to the payment of the Packing Company's debts (P. R. pp. 113-114); that practically all of said assets at all of said times were within the jurisdiction of the Alaskan court (P. R. p. 114); that appellant is in possession of said property and has used the same for its own profits and has made large and remunerative profits and earnings out

of its use and operation, and claims to be the owner thereof (P. R. p. 114, 115); that there are a large number of unpaid creditors of the Trading Company who have filed proofs of their claims in the bankruptcy proceedings, and that the assets of the bankrupt Trading Company are not sufficient to pay the lawful claims of its creditors (P. R. p. 115); that the creditors of the Trading Company have been hindered, delayed and defrauded in the collection of their said debts against the bankrupt Trading Company, and the Trading Company itself and the appellee as its trustee have been hindered, delayed and defrauded in the collection of the said debts for which said judgment was obtained by reason of said conveyance, and that they will be permanently hindered, delayed and defrauded in the collection thereof unless appellant is commanded to reconvey said assets to the Packing Company, or decree that said property is subject to the unpaid debts of the Packing Company, or decree that appellant pay the unpaid debts of the Packing Company, including said judgment (P. R. p. 115, 116); that no part of said judgment has been paid, and the whole is due, amounting to $10,333.31, with interest from January 31, 1915, and costs in the suit in which judgment was obtained, amounting in all at the date on which judgment was rendered in the suit against the Packing Company to $10,833.31 (P. R. p. 117). Appellee prayed that said conveyance be adjudged null and void, that the appellant account for the use of said assets, and for the earnings and profits thereof, and make restitution of said assets, profits and earnings, or, if resti-

tution cannot be had, that it be adjudged that appellant hold said property subject to the debts of the Packing Company, and that sufficient thereof be sold to satisfy the unpaid debts of the Packing Company, including said judgment recovered by appellee against the Packing Company, or, if neither restitution nor sale can be had, that the appellant be required to pay the unpaid debts of the Packing Company, including said judgment recovered by appellee against the Packing Company, amounting to $10,333.31, with interest from January 31, 1915, and costs in the suit in which said judgment was obtained, aggregating $10,833.31, with interest from August 27, 1915 (P. R. p. 117, 118); attached to said complaint was a copy of the judgment (P. R. p. 119) obtained in cause No. 1328-A of the District Court for Alaska, at Juneau, appellee against the Packing Company, and a copy of the purported conveyance (P. R. p. 120) by the Packing Company to the appellant of all the former's assets.

Answer.

Appellant answered generally in the Alaska suit, admitting that it is an Oregon corporation, and alleging authorized to engage in business in Alaska, and domesticated and licensed therein (P. R. p. 124); admitted that appellee as trustee became owner of all assets of bankrupt Trading Company (P. R. p. 126), but denied that he ever became owner of the debt on which he obtained judgment against the Packing Company (P. R. p. 127); denied that said debt was an asset of the bankrupt estate; alleged that on January 6, 1914, the Trading Company assigned said debt

to Kendall and Sanborn, and latter became owners thereof; that appellee obtained said judgment by fraud; that on May 12, 1914, the Packing Company sold all its assets to appellant for $72,621.01; that appellant became the owner thereof, and paid said consideration to the Packing Company in gold coin, together with further sum of $8,556.17, making a total of $81,177.18 paid for said assets and received by Packing Company (P. R. p. 129); that at said time Kendall and Sanborn were the owners of said debt; and that the Trading Company was not then a creditor of the Packing Company; that appellee knew of conveyance (P. R. p. 131) at time he qualified as trustee; that the Packing Company before the Trading Company was adjudicated a bankrupt paid the latter all its claims, including said debt, against the former (P. R. p. 132); admits that it took possession of assets of Packing Company, and has used and operated the cannery (P. R. p. 133); denies that it has made large profits. It also set up three affirmative defenses. The first of which alleges citizenship of appellant; business and domestication in Alaska; citizenship of Trading Company and business in Alaska; management by one Ernest Kirberger; citizenship of Packing Company; that Kirberger also its President and General Manager; operations in Alaska; that at close season 1913 Packing Company's books showed assets $76,300.65, and liabilities $81,203.22 (P. R. p. 136, 137); that said assets did not exceed $65,000.00 (P. R. p. 137); and, on execution or bankruptcy sale, $40,000.00; that Packing Company unable to continue

operations account finances (P. R. p. 137); that Trading Company on January 6, 1914, while a going concern, assigned for a valuable consideration to Kendall and Sanborn its entire claim against Packing Company, aggregating $8,582.21; that said claim never became assets of appellee as trustee in bankruptcy of Trading Company; that appellee falsely claimed there was $10,333.31 due Trading Company from Packing Company in his suit against the latter; that the judgment in the last mentioned suit was fraudulent. The second affirmative defense, after alleging citizenships and business, and financial condition of Packing Company, as aforesaid, alleged that on May 11, 1914, Packing Company offered to and did sell to appellant its entire assets for $72,621.01; that said sale was authorized by the stockholders and directors of the Packing Company; that appellant has ever since said time been the owner of said assets, and the appellee has no right thereto; that appellee should be enjoined from claiming to own any of said property or from contending that said conveyance was null and void. The third affirmative defense alleges that the appellee should be estopped from claiming that said conveyance was null and void.

Reply.

All the affirmative allegations in appellant's answer were denied (Stipulation, P. R. p. 103; Order, P. R. p. 105).

The Alaska suit was consolidated with and submitted for determination with the Oregon suit (Stipulation, P. R. p. 101; Order, P. R. p. 104).

It is therefore clearly evident that originally the

two suits were easily distinguishable, being not only dissimilar in theory but also in the relief and subject matter; that their apparent similarity arises out of the fact that they both sought to have assets of the Packing Company restored by the appellant for the purpose: in the Oregon suit, at the request of a minority stockholder; in the Alaska suit, that a judgment creditor might obtain payment of its claim. This apparent similarity was increased by the fact that appellant in his third affirmative defense (P. R. p. 35), in the Oregon suit, set up the complaint filed by appellee in the Alaska suit, and that in answer thereto the appellee in his reply set up the judgment (P. R. p. 95) obtained by him in the suit which he brought against the Packing Company in the District Court for Alaska, and prayed for the further relief that appellant be required to pay that judgment. This then placed the pleadings in the Oregon suit in such condition that all of the pleadings in the Alaska suit were contained therein with the exception of appellant's answer in the Alaska suit. It should be borne in mind that there are three suits involved, i. e.: the Oregon suit; the Alaska suit, and the suit No. 1328-A in the District Court for Alaska in which appellee obtained judgment against the Packing Company, and for the payment of which judgment the Alaska suit was instituted, although, as stated, appellee in his reply in the Oregon suit also requested decree for the payment of said judgment. So far as recovery as a minority stockholder is concerned, while we are unable to agree with the learned trial court, at the same time we realize that it held against appellee on that score.

FACTS.

Appellee (plaintiff below) is the duly appointed, qualified and acting trustee in bankruptcy of the Kake Trading and Packing Company, herein designated as the Trading Company, which upon its own petition was duly adjudicated a bankrupt on April 9, 1915, by the United States District Court for Alaska, at Juneau (P. R. p. 175), and the appellee as such trustee does not have sufficient assets in hand to pay the just and lawful claims and demands of the creditors of the bankrupt Trading Company which have been filed against it in the bankruptcy proceedings (P. R. pp. 175, 176; Plff. Ex. 1 and 2).

The Trading Company is a Washington corporation (P. R. pp. 4, 176, 178), organized in 1904 by Burwell, Morford, Sepp and Ernest Kirberger, with a capitalization of $25,000.00 (P. R. p. 178), the stock being divided into 25,000 shares of the par value of $1.00 each (P. R. p. 210). Burwell subscribed for 24,998 shares, Kirberger for one share, and Morford for one share (P. R. p. 210). Burwell paid for his 24,998 shares by transferring certain property to the corporation (P. R. pp. 204, 206, 207, 208), which property was afterwards acquired by the Packing Company, and later, by the conveyance in suit, by the appellant from the Packing Company (P. R. p. 204). Kirberger afterwards purchased a quarter interest in the stock, or 6250 shares, from Burwell (P. R. pp. 206, 208), and later purchased a further 18,747 shares from Burwell (P. R. p. 210; Plff. Ex. 25), making a total of 24,998 shares which he owned at the time of the trans-

actions in suit (P. R. pp. 210, 211, 242, 243, 244). Kirberger was president, manager, and a trustee of the Trading Company (Plff. Ex. 62). The Trading Company was engaged in business at and near Kake, Alaska, its chief business being a mercantile business (P. R. p. 180).

The Kake Packing Company, herein designated as the Packing Company, is an Oregon corporation (P. R. p. 176), which was organized by Kendall, Sanborn and Kirberger with a capitalization of $50,000.00 divided into 500 shares of the par value of $100.00 each (P. R. p. 187). Sanborn subscribed for 85 shares, Kendall for 85 shares, Gordon for 60 shares, G. C. Fulton for 20 shares, F. H. Sanborn (son of G. W. Sanborn) for 10 shares, A. C. Kirberger (brother of Ernest Kirberger) for 60 shares, and Ernest Kirberger in all for 125 shares. Kirberger took the 125 shares in his own name, although they were all paid for with assets of the Trading Company (P. R. pp. 187, 189-194). The Trading Company, by resolution (P. R. pp. 188, 204; Plff. Ex. 15), authorized Kirberger to purchase 85 shares by transferring to the Packing Company certain of its property (P. R. p. 210). However, the Trading Company never authorized Kirberger to purchase the additional 40 shares, and, when he subscribed for the same he expected to pay for it by raising money from his sister (P. R. p. 187), but the Packing Company became indebted to the Trading Company for $4,000.00, in payment of which it remitted its check for that amount, which check Kirberger endorsed back to the Packing Company in pay-

ment of said 40 shares (P. R. pp. 189-194). Gordon and Sanborn had knowledge that this $4,000.00 of the Trading Company was used by Kirberger to purchase this 40 shares of stock; in fact, the endorsement was prepared by them before forwarding check to Kirberger in the first instance (P. R. pp. 194, 195; Plff. Ex. 16 and 17). Kirberger was also president and manager of the Packing Company (P. R. p. 188), but was under the supervision of Kendall and Sanborn (P. R. p. 327).

Appellant is an Oregon corporation (P. R. p. 176), organized in 1902 (P. R. p. 345), of whose stock the defendants Sanborn and Kendall were the sole owners (P. R. pp. 256, 437). Sanborn was its president and general manager (P. R. p. 313), and Kendall and Sanborn were the sole agents and representatives of, and duly authorized to act for, appellant in the transactions involved (P. R. pp. 257, 312, 313, 379).

On January 6, 1914, Kirberger made two assignments to Kendall and Sanborn, i. e.: One of said 125 shares of stock in the Packing Company (P. R. pp. 229, 230; Plff. Ex. 59, 60), which stock had been purchased with assets of the Trading Company (P. R. pp. 187-194); and one of an indebtedness owing to the Trading Company from the Packing Company for goods, wares and merchandise furnished and moneys advanced, amounting to $8582.21 (P. R. pp. 231, 232; Plff. Ex. 61).

At the time of making said assignments the Trading Company was insolvent (P. R. pp. 227; Plff. Ex. 67, 67a; Op. Trial Court, P. R. p. 157); and the Trad-

ing Company and Kirberger (P. R. p. 227), as well as Kendall and Sanborn, each knew and had reasonable cause to believe that the Trading Company was insolvent (P. R. pp. .. ..; Plff. Ex. 49, 58 and 58b), and they and appellant knew that the Trading Company was a corporation (P. R. pp. 212, 392, 393, 406, 442).

The Trading Company received no consideration for either of said assignments except the sum of $1.00 (P. R. p. 249; Op. Trial Court, P. R. p. 157), although appellant claimed that Kirberger thereby received an option on stock in the Packing Company. The assignment (Plff. Ex. 59) contained statements which were not true, and on its face purported to give Kirberger an option to purchase 170 shares of stock for $65,000.00; whereas, the par value of said stock was only $17,000.00 (P. R. pp. 229, 230, 231, 383-387). The Trading Company never authorized nor ratified said assignments, but at the first meeting of its stockholders and board of trustees held after the making thereof disapproved and discountenanced the same (P. R. pp. 234, 245, 248; Plff. Ex. 62; Op. Trial Court, P. R. p. 157). On March 21, 1914, the terms of said option were attempted to be changed by an additional writing.

On May 11 or 12, 1914, upon offer of the appellant (P. R. pp. 256; Deft. Ex. ——), the Packing Company conveyed by bill of sale (Plff. Ex. 64) its entire assets to appellant for an alleged consideration of $72,621.01. However, not one cent of money actually changed hands, but the transfer was entirely a matter of book entries (P. R. pp. 258, 265, 266, 401, 403,

404); the appellant assuming part of the liabilities (P. R. p. 351) of the Packing Company and paying them itself, not delivering the consideration to the Packing Company for distribution. As a mater of fact thousands of dollars of said liabilities were not paid until the fall of 1914 after large profits had been earned off the operation of said plant (Sanborn's testimony; also P, R. pp. 295, 296); and several thousand dollars had not been paid at the time of the trial (P. R. pp. 368, 371, 372). Kendall and Sanborn, who were sole owners of the stock of the appellant (P. R. pp. 256, 437), acted for and represented the appellant in the transaction (P. R. pp. 256, 312, 313, 379), being at the same time stockholders and officers of the Packing Company. The Packing Company immediately ceased business and Kendall and Sanborn knew prior to and at the time of the sale that the Packing Company was going out of business (P. R. pp. 315, 399, 402), and also knew that the $8,582.21 account was a just debt against the Packing Company in favor of the Trading Company (P. R. pp. 441). The Packing Company on the date of the conveyance was insolvent (Op. Trial Court, P. R. p. 154). Practically all the liabilities which appellant assumed were either personal claims of Kendall, Sanborn, Sanborn & Son, or appellant, or liabilities which they had either secured or indorsed (P. R. pp. 252, 253, 305, 347, 377, 379). On the same date, Kirberger, the Trading Company, and the Packing Company (Plff. Ex. 65) deeded to appellant for an alleged consideration of $10.00 a certain tract of land about one mile southeast of the village of Kake, Alaska, for which the

Trading Company later in November, 1914, received patent from the United States (Plff. Ex. 9). The Trading Company did not authorize said deed (P. R. p. 262), and received no consideration as a matter of fact (P. R. p. 262), and was at said time insolvent. The tract involved was the same tract which had been conveyed by Burwell to the Trading Company, by the latter to the Packing Company (P. R. pp. 203, 204), and the consideration of $1750.00 for which was charged back against the Trading Company on the books of the Packing Company at the direction of Sanborn (P. R. pp. 221, 261, 405) until such time as patent was received by the Trading Company from the United States. Neither the Packing Company nor appellant has paid the Trading Company said $1750.00 for said tract (P. R. pp. 400, 405).

On August 27, 1915, appellee duly obtained judgment in cause No. 1328-A in the District Court for Alaska, at Juneau, against the Packing Company (Plff. Ex. 69) for $10,333.31, together with costs and interest from January 31, 1915, aggregating $10,-833.31. This $10,333.31 includes the debt of $8,582.21 for goods, wares and merchandise furnished and moneys advanced, which has not been paid (P. R. p. 225), and the further item of $1750.00 on account of the consideration for said tract of land (P. R. pp. 225, 226, 294, 295; Op. Trial Court, P. R. pp. 154, 155). An execution which was duly issued on this judgment was returned wholly unsatisfied and nulla bona (Plff. Ex. 70).

Appellant from its operation of said plant made

profits in 1914 of $13,911.83, and in 1915 of $13,893.36 (P. R. pp. 295, 296; Deft. Ex. B).

The question is: Is the appellant liable to the appellee for the $10,333.31, or a pro rata thereof based upon the ratio of the assets and liabilities of the Kake Packing Company at the time appellant took its entire assets?

We most respectfully submit that the question must be answered in the affirmative for the reasons hereinafter mentioned.

POINTS.

1. A trustee in bankruptcy takes better title than the bankrupt, and is given the right of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in custodia legis.

2. The creditors of a corporation have a claim upon its assets of which they cannot be deprived by an unauthorized act of the corporation or of its officers, although such officers may own all the stock in the concern.

3. A corporation holds its property subject to the payment of the corporate debts and cannot sell or in any wise alien its property to the prejudice of its creditors so as to hinder, delay or defraud them in the collection of their debts owing by it, and when the corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is charged with knowledge that the property is subject to the corporate debts, and equity will allow the corporate creditors to follow the property into the hands of purchasers for the satisfaction of their claims.

ARGUMENT.

I.

A TRUSTEE IN BANKRUPTCY TAKES BETTER TITLE THAN THE BANKRUPT, AND IS GIVEN THE RIGHT OF A JUDGMENT CREDITOR HOLDING AN EXECUTION DULY RETURNED UNSATISFIED WITH RESPECT TO PROPERTY NOT IN CUSTODIA LEGIS.

(a) Bankruptcy Act of 1898 amended June 25, 1910, gave trustee additional rights.

It is admitted that appellee is the duly appointed, qualified and acting trustee in bankruptcy of the Trading Company, which was duly adjudicated a bankrupt in 1915 (P. R. p. 175). Appellant has obviously overlooked the amendment of June 25, 1910, to the Bankruptcy Act of 1898, and the decisions of this and other Courts as to the effect thereof.

In Pacific State Bank vs. Coats, 205 Fed. 618, at 622, this Court, speaking through Judge Wolverton, said:

"It is the purpose of this amendment to vest in the Trustee for the interest of *all* creditors, the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The Trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt;" * * *

To the same effect, see:

Cooper Grocery Co. v. Park, 218 Fed. 42 (5 C. C. A.).

In re Lane Lumber Co., 217 Fed. 550 (9 C. C. A.)

In re Gebris-Hebrine Co., 188 Fed. 503.

In re Kessler, 186 Fed. 127.

In re Kobler, 159 Fed. 871.

Loveland on Bankruptcy, 4th Ed. Vol. 1, 768.

Falco v. Kanpisch Creamery Co., 42 Or. 422, 70 Pac. 286.

In re Downing, 201 Fed. 93 (2 C. C. A.)

It is therefore apparent that decisions similar to Zarlman v. Bank, 216 U. S. 134, which was decided prior to said amendment, are no longer pertinent. Point I of appellant's brief therefore requires no further discussion.

Furthermore, it is a sufficient answer to Point II of appellant's brief to call attention to the evidence (P. R. pp. 175, 176; Pl. Ex. 1 and 2), which clearly adduces the very proof that appellant therein makes demand for; disclosing that claims have been filed and that there are not sufficient assets in hand to pay the same in full.

(b) A trustee in bankruptcy may set aside fraudulent conveyances even though the creditors of the bankrupt were not such creditors at the time of said conveyance.

The Trading Company was a creditor of the Packing Company on January 6, 1914 (P. R. pp. 231, 232, 441), for $10,333.31, which has not been paid (P. R. pp. 225, 400, 405). At least part of the creditors of the bankrupt, now represented by appellee as trustee, were creditors of and held claims against the bankrupt on January 6, 1914 (P. R. pp. 175, 176; Pl. Ex. 1 and 2).

While appellee in his capacity as trustee in bankruptcy has all the rights of a judgment creditor (Pacific State Bank v. Coats, supra, and other cases above cited), yet appellee has gone further than this and has exhausted his legal remedies before seeking to require appellant to pay the indebtedness owing to the bankrupt by the Packing Company (Pl. Ex. 69 and 70). Appellant contends that this judgment is void, although there is an absolute lack of argument and authorities to support that contention. However, we submit that the record discloses that this judgment is valid, and obtained fairly and honestly. Moreover, that appellee in bringing the suit in which the judgment was rendered acted in the best of faith and endeavored to obtain payment of the claim due the Trading Company from the Packing Company, without in anywise subjecting appellant to any embarrassment. Furthermore, appellant was in no wise injured by the rendering of the judgment, and it was not necessary to first bring a direct action to set aside the assignment of January 6, 1914, before bringing the suit against the Packing Company.

Buffalo v. Litsan, 124 Pac. 968; 970.
20 Cyc. 656, 407, 408.
Smith v. Ried, 134 N. Y. 568.

The appellee as trustee therefore represents all the creditors of the Trading Company, bankrupt, which is a creditor of the other corporation Packing Company, insolvent; and the appellee as trustee represents all the bankrupt's creditors, regardless of whether they were such creditors on January 6, 1914, and may recover property conveyed in fraud of creditors for the equal

benefit of all the creditors, and not simply for those existing at the time the transfer (assignments) was made.

"Under Sec. 70a, B. A., the trustee of the estate is vested with the title of the bankrupt, including all property transferred by him in fraud of creditors, and property which, prior to the filing of the petition, he could by any means have transferred, or which may have been levied upon and sold under judicial process against him.

"Under Sec. 70e, of the same act, the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and he is given authority to recover the property in the hands of any one not a bona fide holder for value. * * *

"Under the bankruptcy act, when the conveyance was set aside, the lien or attachment being within four mouths of the bankruptcy proceeding, the bankrupt being then insolvent, * * * it (the lien) became good under the provisions of the bankruptcy act for the benefit of all the creditors of the estate."

Globe Bank v. Martin, 236 U. S. 288, 35 S. C. 377, 59 L. ed. 583, at 587, 588, 590.

Same case, 193 Fed. 840, at 847, 848 (6. C. C. A.)

See also:

In re Farmers Co-operative Co., 202 Fed. 1008, at 1009, 1010.

In re Kobler, 159 Fed. 871, at 874 (6 C. C. A.)

We will hereinafter discuss the proposition that the appellant is not a bona fide holder for value.

(c) Trading Company was insolvent on January 6, 1914.

The definition of insolvency as laid down by the Bankruptcy Act of 1898, as amended 1910, Sec. 1 (15), is as follows:

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he might have conveyed, transferred, concealed or removed with intent to hinder, delay and defraud creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

The evidence (Pl. Ex. 67 and 67a; P. R. pp. 175, 176, 281, 289, 340, 341, 344; Kirberger's and Jaegar's testimony) conclusively shows, without any contradiction in the record, that the Trading Company was insolvent on January 6, 1914, at the time of making the two assignments to Kendall and Sanborn, and that its liabilities were then $21,469.33 and its assets $14,312.00. The trial court in its opinion (P. R. p. 157) found that it was practically insolvent, or at least was made so by the two assignments. However, we respectfully submit that under the bankruptcy law, appellant to avoid the consequences of the assignment made on January 6, 1914, by the Trading Company, could not compute the value of the property so conveyed in arriving at its assets and in ascertaining whether the aggregate of its property, at a fair valuation, was sufficient to pay its debts.

Lansing Boiler Works vs. Ryerson, 128 Fed. 703.
In re Crenshaw, 156 Fed. 638.

It is also a well established doctrine that, in creditors' suits to set aside fraudulent conveyances, the property retained must, at a fair valuation, be clearly and amply sufficient to satisfy the creditors' claims.

20 Cyc. 459.

(d) Fraud may be inferred, and will be presumed if the necessary result of the act is to place the debtor's

property beyond the reach of legal process so as to delay creditors.

While the learned trial court, in its opinion, held that there was no actual fraud, it found that the Trading Company received no consideration for the assignments and did not authorize the same. Inasmuch as the assignments left the Trading Company insolvent and without sufficient assets to pay its debts and beyond their reach by legal process, it will be presumed that the assignment was made with a fraudulent intent.

Crawford v. Beard, 12 Ore. 454, 8 Pac. 537.

To the same effect see:

Elfelt v. Hirsch, 5 Ore. 255.

Fleischman v. Bowser, 62 Fed. 259.

Thomas v. Crane, 73 Fed. 327.

In re Minard, 156 Fed. 377.

Manufacturing Co. vs. Standard &c Co., 131 Fed. 217.

In re Salmon, 143 Fed. 400.

Johnson vs. Wald, 93 Fed. 640.

In re Wright Lumber Co., 143 Fed. 1013.

Toof vs. Martin, 80 U. S.—, 20 L. ed. 481, 13 Wall. 40 at 51.

In re Gilbert, 121 Fed. 953.

20 Cyc. 453.

(e) Kirberger, Kendall and Sanborn knew Trading Company was insolvent.

The evidence conclusively shows that Kirberger, who was president, manager and a trustee of the Trading Company, knew, prior to January 6, 1914, that the Trading Company was insolvent, unable to pay its debts

in the usual course of business, and that at least one suit had theretofore been instituted against it by a creditor for the collection of his claim (P. R. pp. 227, 341, 344; Pl. Ex. 67 and 67a); and furthermore that Kendall and Sanborn were likewise informed of the insolvency of the Trading Company, and had reasonable cause to believe it was insolvent (Pl. Ex. 49, 58 and 58b).

'(f) No consideration for assignments of January 6, 1914.

There was no adequate, genuine consideration to the Trading Company for the assignments of January 6, 1914, and the learned trial court so found (Op. P. R. p. 157). There was nothing received by the bankrupt Trading Company to take the place of its assets so assigned—nothing received by it upon which its creditors could levy to satisfy their claims against it. Even appellant, we submit, is unable to disclose any consideration moving to the Trading Company except $1.00, which is such a grossly inadequate consideration that it shocks the conscience and furnishes satisfactory, decisive evidence of fraud.

Archer v. Lapp, 12 Or. 202.

Even conceding for the sake of argument that the Trading Company, and not Kirberger, received an option, and that that option contained the most favorable terms possible for appellant to claim it contained under the letter of March 21, 1914 (Deft. Ex. E), instead of containing the terms of the actual and *only* writing on January 6, 1914 (Pl. Ex. 59, 60, 61; P. R. pp. 324, 383), still there was nothing which inured to the benefit of the Trading Company.

There was an absolute lack of a genuine, adequate consideration, and the want thereof makes the assignments fraudulent.

Hesse v. Barrett, 41 Or. 203, 68 Pac. 751.
Baldwin v. Johnson, 14 Or. 554, 13 Pac. 434.

Likewise, the want of a valuable consideration renders the assignments fraudulent.

Flynn v. Baisley, 35 Or. 218.
Scoggin v. Schloath, 15 Or. 380.

Under the evidence, we submit that the burden of proof was upon appellant to prove that Kendall and Sanborn were bona fide purchasers for value, and without notice, and that it entirely failed to sustain that burden.

Webber v. Rothchild, 15 Or. 385.
Stubling v. Wilson, 50 Or. 284.

II.

THE CREDITORS OF A CORPORATION HAVE A CLAIM UPON ITS ASSETS OF WHICH THEY CANNOT BE DEPRIVED BY AN UNAUTHORIZED ACT OF THE CORPORATION OR OF ITS OFFICERS, ALTHOUGH SUCH OFFICERS MAY OWN ALL THE STOCK IN THE CONCERN.

(a) The assignments were not the act of the Trading Company.

The trial court found, in its opinion, that there was no consideration moving to the Trading Company for the assignments of January 6, 1914, and that they were

not made by authority of its board of directors (P. R. p. 157). Such findings were clearly warranted under and supported by the evidence, and, if the burden of proving the want of such authority is upon appellee, as contended by appellant, then appellee certainly met that burden with a clear, uncontradicted preponderance of the evidence (P. R. pp. 227, 229, 234; Pl. Ex. 62). Furthermore, it is apparent from the circumstances under which the transactions took place that Kendall and Sanborn knew that Kirberger had not been authorized to make such assignments (P. R. pp. 227, 229, 346, 347, 393).

However, we earnestly maintain that the burden of proof was upon the appellant to show that the Trading Company had either authorized or else ratified and acquiesced in the assignments.

Crawford v. Albany Ice Co., 60 Pac. (Or.) 14.
Harding v. Idaho-Oregon Co., 110 Pac. (Or.) 413.

(b) Kirberger had no implied authority or power to make the assignments for the Trading Company.

Kirberger did not, in consequence of being the owner of all but two shares of the total stock of the Trading Company (P. R. pp. 210, 211, 242, 243, 244), acquire the right to act for the corporation, or as the corporation independently of the directors. In fact, even if he had owned all the stock, the existence, relation and business methods of the corporation would continue. This doctrine is supported by numerous authorities.

Cook Corp. 6th Ed. Vol. 3, Sec. 709, pp. 2227, 2228.

Potts v. Wallace, 146 U. S. 689, 36 L. ed. 1135.
Mays v. Foster, 13 Or. 214.
Parker v. Bethel Hotel Co., 96 Tenn. 252.
Isham v. Bennington Iron Co., 19 Vt. 230.
Wheelock v. Meulton, 15 Vt. 519.
Buffalo, Etc. Co. v. Medina Etc. Co., 162 Ky. 67.
Hopkins v. Roseclare Lead Co., 72 Ill. 373.
Allemong v. Simmons, 124 Ind. 199.
Donaghue v. Indiana Etc. Ry., 72 Iowa 750.
Button v. Hoffman, 61 Wisc. 20.
Bank v. Construction Co., 97 Tenn. 1.
Harrington v. Connor, 51 Nebr. 214.
Lawson v. Black Etc. Co., 44 Wash. 26, 86 Pac. 1120.

The principle seems axiomatic, as neither a person nor all of the natural persons who compose a corporation or who own its stock and control its affairs, are the corporation, and even though a single individual compose a corporation he is not himself the corporation; in such cases the individual is one person and the corporation is another person.

7 Ruling Case Law, p. 26.

Furthermore, a single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity.

Cook Corp., 6th ed. Vol. 3, Sec. 709, p. 2225.
Sargent v. Am. Bank & Trust Co., 154 Pac. (Or.) 759 at 765.

And a deed of corporate property by a person who owns all the stock does not convey good title.

Cook Corp. 6th Ed., Vol. 3, Sec. 709, p. 2226.

(b) The assets of a corporation constitute a trust fund for the payment of the debts of its creditors.

The doctrine that creditors of a corporation have a right to look to its assets for the payment of their claims against it is so thoroughly established that no argument is required.

7 Ruling Case Law, Sec. 169, p. 199; Sec. 561, p. 573.

Chicago, Etc., R. R. Co., v. Howard, 7 Wall. 392, 19 L. ed. 117, at 120.

10 Cyc. 1266, 1267.

Leathers v. Janney, 6 L. R. A. 661.

From the principles announced in subsections A and B, it logically follows that the creditors of a corporation have a claim upon its assets of which they cannot be deprived by an unauthorized act of the corporation or of the corporation's officers, although such officers may own all the stock in the concern. Moreover, the conclusion reached is amply supported by weighty authority.

Stewart vs. Gould, 36 Pac. (Wash.) 277.

Mill Co. vs. Lumber Co., 52 Pac. (Wash.), 1067 at 1070.

In re Haas Co., 131 Fed. 232 (7 C. C. A.).

Germania Etc. Co. vs. Boynton, 71 Fed. 797 (6 C. C. A.).

Bank vs. Bank, 227 Fed. 714 at 715.

(c) Neither Kirberger on behalf of the Trading Company, nor the latter itself, could waive the lien of its creditors to look to its assets, i. e., the debt of $8582.21 for the payment of their claims against the company, nor would any such waiver or estoppel therefrom operate against the appellee as trustee in bankruptcy.

Car Co. v. Transpn, 35 L. ed. 68 (139 U.S.)

In this connection, it should be borne in mind that appellee is the trustee in bankruptcy of the Trading Company, and is seeking to obtain possession of assets transferred by that company in fraud of its creditors; that those assets consisted of a claim against the Packing Company, which later conveyed all its assets to the appellant in fraud of the Packing Company's creditors, particularly the Trading Company.

"Title is vested generally in the trustee in and to all property transferred by the bankrupt in fraud of his creditors at any time; and this undoubtedly was intended to mean any past fraud whereby property which should rightfully be applied to the payment of the debts owing by the bankrupt could be followed and seized for that purpose."

In re Kobler, 159 Fed. 871.

We maintain that there is no waiver or estoppel by reason of any of Kirberger's acts against the Trading Company, and particularly as against the latter's trustee in bankruptcy.

WAIVER.

When counsel for appellant admits the rule laid down in the case of Williams vs. Commercial National Bank, 49 Ore. 498, "that a debtor corporation cannot dispose of its entire assets to the prejudice of its creditors and that such grantee must take notice that it takes the assets subject to the lien of the creditors," he in substance, admits the whole case and the liability of appellant in this suit. But he attempts to slip out from under such liability by contending that the Trading Company waived its lien upon the assets of the Packing Company through Kirberger, a majority stock-

holder in the Trading Company, whom counsel for appellant has the temerity to claim had full authority to make such waiver.

(a) Now Kirberger was not the Trading Company, even though he was President and General Manager and owned a great majority of the stock, as the corporation has an existence entirely separate and distinct from its shareholders, with power to transact business, invite credit, incur obligations and discharge them entirely distinguished from its individual shareholders, and their power to transact business, and Kirberger could not use the assets of the Trading Company for his own benefit.

(b) And even if Kirberger had owned all the stock in the corporation, which he did not, since the laws of Washington required at least two stockholders, Kirberger could not by any unauthorized act as a majority stockholder and officer, deprive the creditors of the Trading Company of their claim upon its assets by an attempted waiver.

(c) Then, at the time of the attempted assignment of the Trading Company account to Sanborn and Kendall, the Trading Company was really insolvent, and as the attempted assignment was without the authority of the Trading Company, it was therefor void as to the trustee in bankruptcy. Furthermore, there was no consideration for such assignment.

Now counsel for appellant quotes several authorities alleging that they support his contention that there was a waiver but a careful analysis of these cases shows that in Pritchard vs. Mullhall, 118 N. W. 45, an Iowa case

decided October 28, 1908, there, the defendant had accepted and held in his own possession, an abstract of title to land, and then refused to carry out his contract, and the Iowa Supreme Court held he had waived objections to the title of the land by keeping the abtract and not making objections to the same. This was between individuals only and clearly not applicable here, since here there was an attempted assignment of an insolvent corporation's assets to another corporation. In Currie vs. Continental Casualty Company, 126 N. W. 165, another Iowa case, decided May 3, 1910, it was held that letters passing between plaintiff and defendant should have been offered in evidence for the jury to determine whether there was a waiver, as it was to be a finding of fact, which case is not applicable here. In the case at bar this question was submitted to the Court upon the evidence adduced, and the Court held against the appellant's contention as the President and General Manager of the corporation had no authority whatever to waive the rights of the corporation, its stockholders and creditors. In Alexander vs. North Carolina Savings and Trust Company, 71 S. E. 70, a North Carolina case, decided May 3, 1911, the Court held that "a waiver is an intentional relinquishment of a known right," but here Kirberger did not possess a known right that he could waive any claim of the corporation itself or its creditors, to the assets of the Trading Company, and particularly he could not have waived such claim to the assets of an insolvent corporation. In List & Son Company vs. Chase, 88 N. E. 122, an Ohio case, decided March 9, 1909, the Court held "that a

waiver must be intentional, that is, with knowledge of the facts and the party's rights," and in the case at bar Kirberger had no right or authority to act for the Trading Company, and particularly he had no right to act in the matter of waiving any claim or lien against the assets of the Trading Company then held or afterwards obtained by the creditors of the Trading Company or the trustee in bankruptcy. In Connecticut Casualty Company vs. Bridges, 114 S. W. 171, a Texas case, decided November 27, 1908, it was held "that a waiver may be inferred from any circumstances that show that both parties understood that payment of the premium would not be required at a specified date," but here both parties did not have any such understanding for the reason that Kirberger was not the Trading Company and had no authority to represent it in waiving any claim or lien held by creditors against its assets. In First National Bank of Brooklyn vs. Gridley, 98 N. Y. Supp. 451, a New York case, decided April 20, 1906, the Court held that "an express waiver is where there is an agreement between the parties to that effect," and counsel for appellant claims that Kirberger made an express waiver for the Trading Company, but who were the parties in this case at bar? Why, the Trading Company, not Kirberger alone, even if he did own most all the stock. In Kennedy vs. Maury, 66 S. E. 31, a Georgia case, decided November 9, 1909, the Court held that "waiver and estoppel are very different matters," and also held that "waiver depends upon what one himself intends to do," but here it could not and was not left with Kirberger to determine what the

Trading Company itself or its creditors would or intended to do. In Johnson vs. Spencer, 96 N. W. 1041, an Indiana case, decided January 3, 1912, the Court held that "the term waiver generally implies an intention on the part of a *person possessing some right under a contract or the law* to relinquish it for the benefit of another. Waiver is ordinarily personal." Now, in the case at bar, Kirberger had no right whatever under any contract or the law to waive any claim or lien of the Trading Company or its creditors to the assets of the Packing Company, and particularly when the Trading Company was insolvent. In Loftis vs. Pacific Mutual Life Insurance Company, 114 Pac. 134, a Utah case, decided January 18, 1911, the Court held that "a waiver operates as an estoppel on the party who waives," but in the case at bar there was certainly no waiving of their claim by the Trading Company, or its creditors, and Kirberger had no authority to waive for them. In 40 Cyc. 252, et seq., referred to by counsel for appellant, it is plainly set forth that in order to waive a claim or lien, the one attempting to make such waiver, must have full right or authority to do so, which Kirberger did not have.

In all the authorities cited by counsel for appellant on page 33 of his brief, he fails to consider the established facts that the Trading Company was insolvent and that neither the Trading Company nor its creditors had authorized Kirberger to waive their claims or liens against the assets of the Packing Company, and no unauthorized acts of Kirberger as President and General Manager of the Trading Company, could estop the

Trading Company, its creditors, or the trustee in bankruptcy, from enforcing their claims against the appellant holding the assets of the Packing Company. In those authorities quoted, a close examination of the same shows that the waiving party there was solvent, had full authority to make waiver of rights or an individual making waiver of his own rights and none of them are applicable to the case at bar.

It is a recognized principle that any one may waive a right intended for *his own benefit,* if it can be relinquished without detriment to others, but Kirberger had no right or authority to waive any lien or claim of the Trading Company, or its creditors, against the assets of the Packing Company, and there is no bona fide contention by appellant that the Trading Company itself, or its creditors, waived their claim against the assets of the Packing Company. Furthermore, there cannot be a waiver unless one has full knowledge of the material facts, which the directors and creditors of the Trading Company did not have.

10 Cyc. 908, 935, 936.

Bank of U. S. vs. Dunn, 8th L. Ed. 319.

Potts vs. Wallace, 36th L. Ed. 1141.

Thompson vs. McKee, 37 N. W. 369.

Reid vs. Field, 1. S. E. 395.

Knettle vs Newton, 78 Amer. Dec. 187.

Phelps vs. Phelps, 22 Am. Rep. 151.

Benson vs. Metropolitan Life Insurance Co., 144 S. W. 122.

Washington Code, Secs. 3677, 3679 and 3686.

Sargent vs. Am. Bank & Trust Co., 154 Pac. (Or.) 765.

ESTOPPEL.

Appellant contends that Kirberger bound the Trading Company and its creditors by his alleged agreement with the appellant that the Trading Company would not enforce its claim against the assets of the Packing Company, in such a way that the Trading Company, its creditors, and the Trustee in Bankruptcy of the Trading Company, are estopped from enforcing such claim against this appellant and counsel for appellant contends that the Court below entirely overlooked the proposition that a creditor of an insolvent corporation has the right to state to an intending purchaser of its assets that he will not insist upon his claim being paid by such purchaser. But it will be found upon a careful examination of the District Court's carefully prepared opinion handed down in this case that counsel for appellant argues from false premises. The Trading Company was one of the creditors, not Kirberger, and Kirberger had no authority to bind the Trading Company and its creditors. And while Kirberger was President and General Manager of the Trading Company, he was not the owner of all the stock, and even if he was the owner of all the stock in the Trading Company, the creditors of the Trading Company cannot be deprived of their claim upon its assets by his unauthorized act as an officer, and this is true as to the Trustee in bankruptcy, although he may only be representing creditors who became such after the date of the assignment of the claims.

The travesty upon justice which counsel says would happen in case appellant is required to pay the $6,688.87

extra, and interest from May 12, 1914, as it was decided by the United States District Court for Oregon after the fullest consideration and investigation, that it should do, loses its force and appears to be somewhat hypercritical, when it is shown in the testimony that appellant made a clear profit on the assets of the Packing Company of nearly $14,000.00 each year for two successive years after it obtained possession of them.

Furthermore, the assumption by counsel for appellant that Kirberger himself constituted all the stockholders of the Trading Company, and that the signing by one director if that was Kirberger was the same as if all the directors had signed, is absolutely incorrect, for in the State of Washington under whose laws the Trading Company was organized and existed, the law requires at least two stockholders and two directors or trustees.

And even though they had all signed, still it would not have been good as against the creditors of the Trading Company or the Trustee in bankruptcy of said company.

Stewart vs. Gould, 36 Pac. 277.

In re Hass Company, 131 Fed. 232.

Germania Safety V. T. Co. vs. Boynton, 71 Fed. 197.

2nd Thompson on Corporation, Sec. 1241.

Pacific State Bank vs. Coates, 205 Fed. 618.

Williams vs. Commercial National Bank, 49 Ore. 492.

Washington Code 1910, Secs. 3677, 3679, 3686.

Transcript of Record, pp. 152, 160.

Transcript of Record, pp. 295, 297.

III.

A CORPORATION HOLDS ITS PROPERTY SUBJECT TO THE PAYMENT OF THE CORPORATE DEBTS AND CANNOT SELL OR IN ANY WISE ALIEN ITS PROPERTY TO THE PREJUDICE OF ITS CREDITORS SO AS TO HINDER, DELAY OR DEFRAUD THEM IN THE COLLECTION OF THEIR DEBTS OWING BY IT, AND WHEN THE CORPORATION SELLS OR TRANSFERS ITS ENTIRE PROPERTY TO A PURCHASER, KNOWING THE FACT, THE LATTER IS CHARGED WITH KNOWLEDGE THAT THE PROPERTY IS SUBJECT TO THE CORPORATE DEBTS, AND EQUITY WILL ALLOW THE CORPORATE CREDITORS TO FOLLOW THE PROPERTY INTO THE HANDS OF PURCHASERS FOR THE SATISFACTION OF TH ECLAIMS.

(a) Corporate assets are a trust fund for its creditors.

Appellant concedes this doctrine as well as the extension thereof, and admits that where one corporation sells its entire assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and evidence of fraudulent intent or want of consideration is not necessary, and the purchasing corporation takes such assets with notice of

such claims and subject to equitable liens. (Appellant's brief, p. 32.)

It is undisputed that on May 11, 1914, upon offer of appellant (P. R. p. 256; Deft. Ex. . .), the Packing Company conveyed by bill of sale (Pl. Ex. 64) its entire assets to appellant for an alleged consideration of $72,621.01; that not one cent of money actually changed hands, but the transfer was entirely a matter of book entries (P. R. pp. 258, 265, 266, 401, 403, 404); that the only consideration was the assumption of a portion of the liabilities of the Packing Company by appellant (P. R. p. 351), all or practically all of which liabilities were either owing to Kendall, Sanborn, Sanborn & Son, or appellant, or had theretofore been guaranted or endorsed by them (P. R. pp. 252, 253, 305, 374, 377, 379); that the Packing Company had nothing whatever to do with the distribution of said alleged consideration, but that the same was distributed by appellant itself, and that as a matter of fact thousands of dollars were not paid until the fall of 1914 (Sanborn's testimony; Deft's. Ex. M), and several thousand dollars had not been paid at the time of the trial (P. R. pp. 368, 371, 372). In this connection it is interesting to note that appellant admits that it made profits off the operation of the Packing Company's plant in 1914 of $13,911.83, and in 1915 of $13,893.36 (Deft. Ex. B). It is further undisputed that the Packing Company immediately ceased business; that Kendall and Sanborn knew prior to and at the time of the sale that the Packing Company would be obliged to go out of business (P. R. pp. 315, 399, 402), and also knew that the $8582.21 account was a just debt against

the Packing Company in favor of the Trading Company (P. R. p. 441); that they knew all the circumstances of the assignment of January 6, 1914, being participants therein. It is admitted that Kendall and Sanborn were stockholders in the Packing Company, having control of the majority stock; that they owned all the stock of the appellant (P. R. pp. 256, 437); that they were directors in each concern; that Sanborn was secretary of the Packing Company and president and manager of appellant, and that they, and no one else, acted for and represented the appellant in the transaction (P. R. pp. 256, 312, 313, 379). Appellant contends and the trial court found (Op., P. R. p. 154) that the Packing Company was insolvent at that time.

(b) Conveyance was not made in due course of business and operates as a fraud.

It is therefore apparent that the sale was not made in due course of business, and that it was not necessary to disclose a fraudulent intent or want of consideration, and that the appellant took such subject to the lien of the Packing Company's creditors.

Williams v. Bank, 90 Pac. (Or.) 1012, at p. 1015.
White v. Bank, 5 L. R. A. N. S. 520—Note.

(c) Appellant took Packing Company's assets with notice.

Inasmuch as Kendall and Sanborn, who were officers of and owners of the entire stock of the appellant, it cannot be contravened that, inasmuch as they were acting for and were the sole representatives of the appellant, there being no contention that they were not so

authorized to act for the latter, that appellant had notice of all of the inequities of the conveyance.

"It is a well settled principle that notice to an officer or agent of a corporation, in due course of his employment and in respect to a matter within the scope of his authority, or apparent authority, concerning affairs of such character that it becomes his duty to communicate the information to it, is notice to the corporation, whether he imparts to it such information or not."

Dillard v. Mining Co., 94 Pac. (Or.) 966, 968.

7 Ruling Case Law, pp. 656, 658.

(d) Property in hands of appellant will be subjected to the debts of the Packing Company.

1. From the undisputed evidence, it cannot be seriously controverted that the conveyance is well within the rule that when a corporation sells its entire property and rights to a purchaser knowing the fact, equity will in proper cases subject the property in the hands of the purchaser to the payment of the debts that it owes.

Chicago, etc., R. R. Co. v. Howard, 7 Wall. 392, 19 L. Ed. 117, at 120.

10 Cyc. 1266, 1267.

7 Ruling Case Law, Sec. 561, p. 573; Sec. 169, p. 199.

Boyes v. Burke Mining Co., 106 Pac. (Wash.) 475.

Leathers v. Janney, 6 L. R. A. 661.

Morrison v. Am. Snuff Co., 79 Miss. 330, 30 So. 723.

Atlantic B. R. Co. v. Johnson, 56 S. E. 482; 11 L. R. A. N. S. 1119.

Laughin v. Furn. Co., 118 Ill. Ap. 36.

Fogg v. St. L. H. & K. R. R. Co., 17 Fed. 871.

Sharples v. Creamery Co., 78 Neb. 795, 111 N. W. 783; 11 L. R. A. N. S. 863.

Burton v. Salt & Lumber Co., 190 Fed. 262.

Nelson v. Soca Pub. Co., 178 Fed. 136.

In re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33.

2. Moreover, there is a further cogent principle as to why said conveyance is void, and that is because the evidence shows that the consideration of it was entirely to pay liabilities either owing to Kendall, Sanborn, Sanborn & Son, or appellant, or liabilities which they had guaranteed or endorsed (P. R. pp. 252, 253, 305, 347, 377, 379), and at the same time Kendall and Sanborn were stockholders in the Packing Company, having control of the majority stock; they owned all the stock of the appellant (P. R. pp. 256, 437); they were directors in each concern; and Sanborn was secretary of the Packing Company and president and manager of appellant, and they, and no one else, were acting for and represented appellant (P. R. pp. 256, 312, 313, 379).

"Contracts made between corporations which are controlled by same directors will be subjected to severe judicial scrutiny and the courts will set them aside on the least appearance of unfairness."

Hutchinson v. Sutton Mfg. Co., 57 Fed. 998.

In re McCarthy Portable Elevator Co., 196 Fed. 247; 201 Fed. 923.

10 Cyc. 818.

The leading case on this proposition is Sutton Mfg. Co. vs. Hutchinson, 63 Fed. 496. Briefly the facts were

as follows: In forenoon mortgagor filed mortgage covering entire business to Sutton Mfg. Co. Mortgage given to secure drafts drawn by mortgagor on mortgagee. Mortgagor was insolvent at time of giving transfer. Insolvency known or ought to have been known to mortgagor's president, and presumed to have been known by his codirectors. Mortgagor intended to suspend business operations. In afternoon mortgagor made and filed assignment to appellee. Assignment purports on face to have been made because of inability of mortgagor to meet demands of its creditors. Two directors of mortgagor were also directors of the mortgagee; the presidents of each were the same person; the secretaries of each were the same person; the secretary in one was also its treasurer; the president in one was also its treasurer; the stockholders of the mortgagor were all stockholders of the mortgagee, and, with their relatives, owned all the stock in the latter. Hutchinson, assignee, sued to set mortgage aside.

The Seventh Circuit Court of Appeals, speaking through that learned jurist, Mr. Justice Harlan, said at pages 499, 500, 501 and 502 (63 Federal):

"It is quite true that the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors; and such a corporation, so long as it is in the active exercise of its functions, may, if not restrained by its character or by statute, exercise as full dominion and control over its property, having due regards to the objects of its creation, as an individual may exercise over his property. But when it becomes insolvent, and has no purpose of continuing business, the power to sell, dispose of, and transfer its estate is not altogether without limitation.

"* * * a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. * * *

"Entirely different considerations come into view when an insolvent corporation, having no expectation of continuing its business, and recognizing its financial embarrassments as too serious to be overcome, mortgages its property to secure a debt previously incurred by one of its directors, or, in a general assignment of all of its property, gives him a preference. To a general assignment by a private corporation for the equal benefit of all its creditors, including directors, no objection could be made, because it recognizes the equal right of creditors to participate in the distribution of the common fund. Such an assignment, Lord Ellenborough said in Pickstock v. Lyster, 3 Maule & S. 371, 375, is to be referred to an act of duty rather than of fraud, and is an act by the assignor that arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors."

See also:

Brown & Co. v. Sanford F. & T. Co., 44 Fed. 231.

Lippincoat v. Shaw Carriage, 25 Fed. 577.

Hutchinson v. Sutton Mfg., 57 Fed. 998.

In re Salvator Brewing Co., 183 Fed. 910.

Asheville Lumber Co. v. Hyde, 172 Fed. 733.

Bank v. Power Co., 219 Fed. 591; aff. 224 Fed. 39 (9 C. C. A.).

Butterfield v. Woodman, 223 Fed. 956, at 960.

The facts in the case at bar are equally as inequitable as were the facts in Sutton Mfg. Co. vs. Hutchinson, supra, and we earnestly maintain more so, in that: Kendall and Sanborn, the representatives of appellant, knew the circumstances under which the Trading Company had been defrauded of its claim against the Packing Company; they were the prime movers in the several transactions; they knew Kirbgerger was without authority to make the assignments.

Appellant, however, seeks to overcome the doctrines and principles just announced by contending that Kirberger on behalf of the Trading Company waived any right that the Trading Company had as a creditor of the Packing Company to subject the latter's assets to the former's claims, and that the Trading Company, as well as appellee, are thereby estopped to subject those assets to said claim. While we do not concede for a moment that the Trading Company could be estopped by the unauthorized act of Kirberger, in a matter where the Trading Company received no benefit and in no wise led Kendall, Sanborn or appellant to act to their own disadvantage, yet assuming for sake of argument that the Trading Company is so estopped, the fallaciousness of the contention that the Trading Company's creditors or trustee is estopped is at once apparent. The Trading Company would then be contended to have aliened its assets without consideration, to have placed them beyond the reach of its creditors, and, even though no actual intent to defraud had existed, the very result of the act would be to hinder, delay and defraud its creditors and fraud will be presumed.

If such a transaction is lawful, the bankruptcy act would be rendered futile, and whenever a corporation found itself insolvent all that would be necessary to be done to prevent the bankruptcy court from acquiring possession of any of its assets would be to have a majority stockholder or an officer assign them away, and waive any right to reclaim them, or, if the assets consisted of bills receivable from other corporations, to assign those bills away and waive any right that the bankrupt corporation might have as a creditor to obtain payment of its claim out of the assets of those other corporations in case it should become necessary to enforce such payment—and all this, as appellant urges, without consideration and even though the majority stockholder or officer was unauthorized to make any such assignment. However, in this case it is not the bankrupt Trading Company but its trustee in bankruptcy who is seeking relief, and, as stated in the cases which we have cited under division I, the Trustee does not stand in the shoes of the bankrupt but can enforce liens and claims which it might be estopped from enforcing.

(e) Trading Company's deed of May 11, 1914, is invalid.

At the same time that the Packing Company conveyed all its assets to the appellant, the latter took the precaution (P. R. pp. 393, 405 and 406) to have Kirberger, the Packing Company, and the Trading Company execute a deed (Pl. Ex. 65) to appellant for an alleged consideration of $10.00 of a certain tract of land about one mile southeast of Kake, Alaska, for which the Trading Company later in November, 1914, received

patent from the United States (Pl. Ex. 9). The Trading Company did not authorize said deed and received no consideration as a matter of fact (P. R. p. 262), and was at said time insolvent. This is the same tract which was conveyed by Burwell to the Trading Company, by the latter to the Packing Company (P. R. pp. 203, 204), and the consideration of $1750.00 for which was charged back against the Trading Company on the books of the Packing Company at the direction of Sanborn (P. R. pp. 221, 261, 405) until such time as patent was received by the Trading Company from the United States. Neither the Packing Company nor appellant has paid the Trading Company $1750.00 or any other sum for said tract (P. R. pp. 400, 405). This is the tract now occupied by appellant (P. R. pp. 204, ...). The $1750.00 is the item, which with the item of $8,582.21 makes the $10,333.31. (P. R. pp. 221, 225, 226, 294, 295.)

Under the doctrines and principles heretofore announced, and particularly those under division II hereof, this deed was clearly invalid. It is important, however, to bear in mind that the assignment of January 6, 1914, was of an account for goods, wares and merchandise furnished and moneys advanced, amounting to $8582.21, and that this $1750.00 was not included therein (P. R. pp. 225, 226, 294, 295); that at that time the Packing Company actually owed the Trading Company $10,333.31, but that the $1750.00 of that amount had been charged back, in fact, figuratively thrown to one side, at the direction of Sanborn (P. R. pp. 221, 261, 405), and that it has never been paid

(P. R. pp. 400, 405); and that by the deed (Pl. Ex. 65) the appellant acquired the tract without any payment therefore; that the Trading Company had prior to the various transactions involved in the suit made application for patent to the tract, and that this patent was granted to the Trading Company by the United States after the occurrence of the transactions in suit and in November, 1914 (Pl. Ex. 9).

Before closing, we shall refer briefly to appellant's brief on certain contentions as to the evidence.

TRADING COMPANY INSOLVENT.

The statement of counsel for appellant that the books of the Trading Company show clearly that it was entirely solvent, is like many other statements of appellant, absolutely incorrect and misleading, because established on false premises, for the assets of the Trading Company, exclusive of the $8582.21 claim Kirberger attempted to assign to Sanborn and Kendall, amounted to only $14,312.00, and *not* $23,849.54 as claimed by appellant, while the liabilities claimed by appellant, amounted to $21,469.33, leaving the liabilities $7157.33 in excess of its assets. (Appellant's brief, pp. 101 to 106; P. R. pp. 175, 176, 281, 289, 341; Pl. Ex. 67 and 67a.)

In one breath counsel for appellant contends that appellee did not have any witnesses testify as to the value of the assets of the Trading Company, and in the next, refers to a part of the Transcript of Record where witnesses did so testify for appellee, but counsel fails to call attention to the testimony of Kirberger at 452 and 453 of the record where there was introduced in evi-

dence plaintiff's exhibit 67a, showing liabilities of the Trading Company amounting to $21,469.33, upon which basis it is clearly shown that the liabilities of the Trading Company exceeded the assets $7,157.33. And all this testimony of Kirberger and Jaeger is absolutely uncontradicted in any way whatever.

Thus the Trading Company was clearly insolvent after the transfer of the $8,582.21 claim to the Packing Company, and the rule is thoroughly established that if the transfer of the assets of a corporation result in its becoming insolvent on account thereof, and there is not sufficient to pay its debts, then if the assets of the corporation are sold and transferred to another person or corporation, such assets are subject and liable to the claim and lien of the corporation's creditors.

CLAIMS FILED AGAINST ASSETS OF TRADING COMPANY.

As to the claims filed against the bankrupt, Trading Company, we respectfully refer the Court to plaintiff's Exhibits 1 and 2, and the testimony of plaintiff's witnesses, Kirberger and Jaeger shows that the claims filed amounted to $21,469.33 and it was clearly shown in the testimony that the assets only amounted to $14,-312.00, thus, leaving a deficit of $7,157.33, and the property of the Packing Company transferred to appellant, the Sanborn Cutting Company, is therefore liable for the claims of creditors of the Trading Company.

Transcript of Record, 175, 176, 281 to 289, 341 and 452 to 453.

JUDGMENT.

As to the indebtedness of the Packing Company to the Trading Company at the date of the transfer of the assets of the Packing Company to appellant, it was not only the $8,582.21, but also the $1,750.00 due for the canning site at Kake, Alaska, for which appellant had received title from the Trading Company, admitted by defendant's witness Sanborn, and the District Court correctly counted in this amount due for the site.

Transcript of Record, 405 to 407, 221, 261, 262.

INTEREST.

The contention of counsel for appellant as to interest on the judgment is certainly incorrect for the reasons that; (1) the contract between the Trading Company and the Packing Company whereby wares, goods, merchandise and money were furnished the Packing Company at Kake, Alaska, was made in Alaska, where interest begins to run, as expressly allowed by statute, "on money due upon the settlement of matured accounts from the day the balance is ascertained" (and the Oregon statute is exactly the same), which, in this case, was January 6, 1914; (2) this account of $8,582.21 was conceded by appellant to have been the money due upon the settlement of a matured account ascertained on January 6, 1914, and on such accounts interest is expressly allowed by both the statutes of Alaska and Oregon and; (3) the judgment of the Alaska Court for $10,333.31 which included this $8,582.21 account and $1,750.00 admitted by appellant to be due for the canning site rendered on

August 27, 1915, was consolidated with the case brought in the District Court at Portland, and under the law and authorities the District Court could not do otherwise than allow appellee interest at least from May 12, 1914, and while the rate allowed was 6 per cent, appellee contends that he is entitled to 8 per cent, the Alaska rate.

Sec. 684, Compiled Laws of Alaska, 1913.
Sec. 6028, Lords Oregon Laws.
Hemple v. Raymond, 144 Fed. 796.

ASSIGNMENTS XII AND XIII.

However, we make no response to appellant's assignments of errors XII and XIII, because appellant in its brief does not in any wise refer thereto, or furnish either reasoning or authorities as to any error contained in them; it being our understanding that appellant has thereby waived those assignments.

CONCLUSION.

In conclusion, first calling attention to the able opinion of the learned trial court (P. R. p. 152), we urge that the decree and judgment of the trial court should and ought to be affirmed and that the only modification which should be made is that appellee should have judgment for $10,333.31, instead of $6,688.87, with interest from January 6, 1914, on the following, among other, grounds:

1. The assignment of January 6, 1914 (Pl. Ex. 61), as well as the assignment of 125 shares of stock (Pl. Ex. 59), is null and void; that the same was unauthorized by and there was no consideration moving to

the Trading Company therefor; that its necessary result was to defraud the Trading Company's creditors, in that, it placed beyond their reach by legal process the assets of the Trading Company to which the creditors had a right to look for the payment of their claims; further, that it left the bankrupt without sufficient assets to pay its just liabilities, and that on said date the Trading Company was insolvent.

2. The conveyance of May 11, 1914 (Pl. Ex. 64), is null and void; that the same conveyed the entire assets to a corporation (appellant), who was not a bona fide purchaser for value, having knowledge that there were unpaid debts of the grantor (Packing Company), and that the grantor was going out of business; that the only consideration was the assumption of debts owing to or secured by the officers and stockholders of the grantee who were also officers and stockholders of the grantor; that the entire transfer was simply a matter of book entries.

3. That plaintiff is not limited to the rights of the bankrupt and is entitled to have payment made by appellant of the judgment amounting to $10,333.31, which appellant recovered against the Packing Company, which judgment represents the account of bills receivable for $8,582.21 plus the consideration of $1,750.00, which has not been paid, for the tract of land which, although theretofore conveyed by the Trading Company to the Packing Company, was conveyed by the Trading Company, in a joint deed with Kirberger and the Packing Company, to appellant on May 11, 1914 (Pl. Ex. 65).

Appellant seems to feel that it and its officers have been charged with fraud and wrong-doing without any rhyme or reason therefor. However, it sometimes becomes necessary, even at the expense of much pain, to call a "spade" a "spade," and we feel that it is a sufficient response to appellant's cry that the evidence clearly shows that, be the transactions involved fair and honest or wrongful and fraudulent, at the conclusion of them the Trading Company and the Packing Company were both wrecked; that the Trading Company was later obliged to go into bankruptcy; that the Packing Company ceased doing business and its assets were entirely taken away. And, where do we find appellant and its innocent officers at that time? Appellant is found to own all the assets of the Packing Company, from the operation of whose plant it made profits in 1914 of $13,911.83 and in 1915 of $13,893.36, being interest of something over eleven per cent per annum on the entire paid in capital stock of the Packing Company plus its entire liabilities, conceding as argument that appellant paid them all.

In the light of the record and of the decisions cited, we earnestly maintain that no prejudicial error or injury was sustained by the appellant, and that it would be unfair, unjust and inequitable to permit it to prevail as against appellee. We submit that justice and equity are hand in hand in urging that the judgment and decree of the trial court be upheld and sustained, except to be modified by increasing the amount to $10,333.31, and we respectfully pray that it be so ordered.

Respectfully submitted,

GUNNISON & ROBERTSON,

JAMES J. CROSSLEY,